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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

UNION ELECTRIC COMPANY,
Petitioner,
vs.
ENVIRONMENTAL PROTECTION AGENCY,
Respondent,
and
JOHN C. DANFORTH,
Attorney General of Missouri and the
MISSOURI AIR CONSERVATION COMMISSION,
Intervenor-Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR INTERVENOR—RESPONDENTS

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OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 515 F.2d 206. It is printed at Pages A-1 through A-26 of Appendix A to the Petition for Certiorari in this case.

SUMMARY OF ARGUMENT

The issue before this Court is whether the Courts of Appeals have jurisdiction to consider the economic or technological feasibility of emission regulations in a state implementation plan. The position of the State of Missouri is that the jurisdiction of the Courts of Appeals is expressly limited to a review of the factors the Administrator is empowered and directed to consider in his determination whether to approve a state implementation plan; that the Clean Air Act is unambiguous in setting out the Administrator's powers; and that the Act does not include assessment of economic and technological factors as a part of the implementation plan approval process.

Furthermore, the state's position is that the relief that petitioner seeks is properly available through other procedures (namely state variances, or with EPA as a defense in enforcement proceedings). The underlying basis for the proceeding brought below is petitioner's desire to avoid enforcement of the state's sulfur dioxide emission regulations for the St. Louis area against three of its power plants. That is the very nature of a variance, variances being part of the enforcement strategy of the state.

Consequently, petitioner is really attempting to gain a permanent variance from the regulation, but through the method of disapproval of the emission limitation. This approach runs counter to the main goal of the Act, which is to attain and maintain national ambient air quality standards. Allowing a challenge by a specific source to an emission limitation on the basis of inability of the specific source to meet the limitation, with the possible result that a limitation which controls all sources of the pollutant will be disapproved, would certainly interfere with attaining and maintaining the national standards.

Thus, where national standards have not been attained or are not being maintained, a variance for a specific source must be disapproved. If follows that such source should not, by challenging the emission limitation itself, be allowed to in effect obtain a variance, not only for itself but for all other sources. But, in the case where national standards are being attained and maintained, there is no justification for a specific source attempting to obtain a variance by challenging the regulation on the basis of economic and technological feasibility, when the variance procedure is the ready and appropriate remedy.

Not only do pre-enforcement challenges to emission limitations on feasibility grounds run counter to the plain meaning of the provisions of the Act, they run counter to the philosophy of the Act as to state/federal relationships. As expressed by this Court in *Train,* the states are free to make the policy decisions as to how best to meet the central requirement of the Act, i.e., the national standards. This includes whatever mix of emission limitations the state chooses. The states are also free to set more stringent ambient air quality standards and emission limitations if they so desire.

These are proper policy decisions of the state, and it follows that the state may choose any lawful means it desires to acomplish its goals; included, of course, is the ability of the state to grant individual variances from its requirements if necessitated by economical and technological factors, and if desired by the state in the best interest of the citizens of the state. Congress did not intend to interfere with these state policy decisions, and in fact the Administrator must approve such policy decisions so long as national standards are being met.

Accordingly, the state/federal relationship is best served by the consideration of economic and technological

factors by the federal Administrator in the context of federal enforcement proceedings, not in a review of the state's public policy decisions (as expressed in the state implementation plans) during the approval process. The Administrator, therefore, should be, and has been by the clear language in the Act, limited to determining only if the state's policy decisions will do the job required by the Act, i.e., meet the federal standards.

ARGUMENT

I. The Courts of Appeals do not have jurisdiction in an action under Section 307(b)(1) of the Clean Air Act to address questions concerning the economic or technological feasibility of a state implementation plan.

Petitioner's basis for asserting jurisdiction in the court below is Section 307(b)(1) of the Clean Air Act, 42 U.S.C. §1857(h)-5(b)(1). This statute, in relevant portion, states:

> "A petition for review of the Administrator's action in approving or promulgating any implementation plan under Section 110 . . . may be filed only in the United States Court of Appeals for the appropriate circuit. Any such petition shall be filed within 30 days from the date of such promulgation, approval or action, or after such day if such petition is based solely on grounds arising after such 30th day."

This section plainly vests jurisdiction in the Eighth Circuit Court of Appeals to review the action of the Administrator in approving the Missouri implementation plan.[1] The question before this Court is the bounds of that jurisdiction. Put another way, what is the scope of review by the Court of Appeals of the approval by the Administrator of Missouri's implementation plan?

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[1] That portion of the Missouri implementation plan which contains Regulation X(B) of the St. Louis Metropolitan Area Regulations was approved on May 31, 1972. 37 Fed.Reg. 10875 (1972). Thus the petition was filed more than thirty days after the Administrator's approval of the Missouri plan. We need not address in this proceeding whether the various grounds for review alleged by the petitioner arose more than thirty days after the Administrator's approval. The court below held that questions of economic and technological feasibility of an implementation plan can never be reviewed in a Section 307(b) proceeding. The court did not reach the question of timing of the petition. *Union Electric* v. *EPA*, 515 F.2d 206 (8th Cir. 1975), A-6 and A-7 of Pet. for Cert.

A. Jurisdiction under Section 307(b)(1) is limited to the questions which the Administrator could consider under Section 110(a).

The precise question before this Court is whether the Court of Appeals has jurisdiction, pursuant to Section 307(b)(1), to review the technological and economic feasibility of a state implementation plan, or portions thereof. We believe that the resolution of this question is dependent upon the scope of the determination which the Administrator must make in approving or disapproving a state-submitted implementation plan under Section 110(a)(2). Section 307(b)(1) provides for review of the "Administrator's action" in approving a state plan. The Court of Appeals, in reviewing the Administrator's action in approving the plan, would be determining whether the Administrator's decision was "arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law." *Union Electric* v. *EPA, supra,* p. A-12 of Pet. for Cert., and cases cited therein.

It seems axiomatic that given the standard of review by the Court of Appeals, its inquiry is limited to a review of those factors which the Administrator had a legal obligation to assess. *Union Electric* v. *EPA, supra,* p. A-12 of Pet. for Cert. If the Administrator was bound to assess the economic and technological feasibility of a state plan, then it cannot be disputed that the Court of Appeals review may extend to such factors. Conversely, if the Administrator cannot assess such factors in his approval of the state plan, the Court of Appeals has no jurisdiction to review such factors. The essential issue, then, is the scope of the Administrator's inquiry regarding the state plan.

At the outset, it might be helpful to the court's understanding of this case, and to the orderly discussion of the issues, to explain what an implementation plan encompasses. The implementation plan is, basically, a means of assuring that national ambient air quality standards are achieved and maintained. The first step in the process of devising a plan is the cataloging of all sources, in an affected region, of a particular pollutant for which a national standard is set. The cataloging leads to a calculation of the total amount of each pollutant being emitted into the air in the affected region. The second step in the process is a determination (calculation) of the reduction in pollutant emissions which must be achieved in order to maintain national ambient air quality standards in that region.[2] This figure would be expressed in quantitative terms, and would represent the amount of emission reduction which all sources, in the aggregate, must achieve.

The third step is the setting of emission limitations, which will ensure that overall emissions will be reduced by the amount specified in Step 2. The specific emission limitations will, however, usually be expressed in terms of a quantitative limit on the amount of emissions allowed from a particular source, and not as a percentage reduction in emissions from that source. These specific emission limitations need not be uniform among all types of sources in a region. *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60, 95 S.Ct. ____, 43 L.Ed.2d 731 (1975). The fourth step is to set deadlines for compliance by sources with the specific emission limitations. These deadlines will assure that national standards are met within the time limits set by Section 110(a)(2)(A), or sooner if the state so desires.

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[2] As discussed later, the State might choose to set its own, more stringent, ambient air quality standards. If so, then emission reductions will be calculated to achieve those more stringent standards. More stringent state air quality standards would not need to be submitted to the Administrator for approval.

The fifth step is the provision of adequate procedures and machinery to enforce the specific emission limitations. The enforcement machinery would include, at a minimum, those things spelled out in Section 110(a)(2)(C)-(H). As pointed out below, it may also include a procedure for granting relief from the provisions of an emission limitation or compliance deadline variances, if such relief does not threaten national ambient air quality standards, and if such relief would serve state interests.

The implementation plan, then, is arrived at via a five-step process. When submitted to the Administrator, it will contain, at a minimum, three components: (1) specific emission limitations; (2) compliance schedules or deadlines; and (3) enforcement and other machinery to ensure that the requirements of the Act and the plan are achieved. The plan might also contain other components, such as transportation and land-use controls. See Section 110(a)(2)(B).

State regulations are the legal vehicles by which implementation plans are promulgated. A particular regulation might impose a specific emission limitation on a source or class of sources. The same regulation might also specify the schedule or deadline for compliance. State regulations would also be required for those matters mentioned in Section 110(a)(2)(C)-(H), unless addressed by state statute.

B. The Administrator, in approving state implementation plans, is limited to a consideration of those factors listed in Section 110(a)(2).

In determining what factors the Administrator must assess when approving a state plan, we must look to the Clean Air Act, as the Administrator's action is provided for by that Act. This process, of necessity, involves statutory

construction. Some of the reported cases directly addressing this point have given much attention to the legislative history of the Clean Air Act Amendments of 1970, which provide the current regulatory framework. Petitioner's brief also devotes considerable attention to certain aspects of the legislative history of the 1970 Amendments.

However, we believe that resort to the various Committee Reports, debates, and the House and Senate Bills, is not only unnecessary, but also counter-productive. Resort to the legislative history of a statute is unwarranted when the terms of the statute are clear and unambiguous. *United States* v. *Oregon*, 366 U.S. 643, 81 S.Ct. 1278, 6 L.Ed.2d 575 (1961); *Natural Resources Defense Council, Inc.* v. *EPA*, 507 F.2d 905 (9th Cir. 1974). As argued hereafter, we believe the terms of the Clean Air Act, as regards the issue at hand, to be clear and unambiguous. Moreover, we believe the legislative history itself to be ambiguous and self-contradictory. Reliance on such history, rather than leading to clarity, only results in confusion. See *Buckeye Power, Inc.* v. *EPA*, 481 F.2d 162 (6th Cir. 1973).

1. Section 110(a)(2) does not mention technological or economic feasibility, and other sections of the Clean Air Act show that such exclusion was intentional.

To determine the scope of the Administrator's inquiry into a state plan, one looks first to Section 110. Subsection (a)(1) provides that each state is to adopt and submit a plan which provides for the implementation, maintenance and enforcement of primary and secondary ambient air quality standards (promulgated by the Administrator pursuant to Section 109). Subsection (a)(1) establishes the time frame for submittal of such plans, and also provides that state adoption of plans shall take place after reasonable notice and public hearings.

After providing in Section 110(a)(1) for the adoption

and submission of plans by each state, the Act declares in Section 110(a)(2) that:

> "(2) The Administrator shall, within four months after the date required for submission of a plan under paragraph (1), approve or disapprove such plan or any portion thereof. The *Administrator shall approve such plan,* or any portion thereof, *if he determines* that it was adopted after reasonable notice and hearing and *that*
>
> (A)(i) in the case of a plan implementing a national primary ambient air quality standard, it provides for the attainment of such primary standard as expeditiously as practicable but (subject to subsection (e)) in no case later than three years from the date of approval of such plan (or any revision thereof to take account of a revised primary standard); and (ii) in the case of a plan implementing a national secondary ambient air quality standard, it specifies a reasonable time at which such secondary standard will be attained;
>
> (B) it includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, land-use and transportation controls . . . . [Emphasis added]."

Subparagraphs (C)-(H) set out requirements, not here relevant, dealing essentially with the mechanics of the state's program.

The emphasized words in Section 110(a)(2) are the key to the issue at hand. *Indiana and Michigan Electric Co.* v. *EPA,* 509 F.2d 839 (7th Cir. 1975). Section 110(a)(2) unambiguously declares that the Administrator *shall* approve a state plan if it was adopted after notice and hearing, and if it meets the requirements set forth in subparagraphs (A)-(H). We believe it abundantly clear that the provisions of Section 110(a)(2), and particularly subparagraphs (A)-(H), define the parameters of the Administrator's inquiry.[3] The breadth of the Administrator's discretion in approving state plans is thereby limited by Section 110(a)(2).

Subparagraphs (A) through (H) of Section 110(a)(2) are, although sowewhat general in terms, not at all ambiguous. They require that the state plan contain provisions for: (A) attainment of primary and secondary standards within certain periods; (B) emission limitations, schedules, timetables of compliance and other measures for attainment and maintenance; (C) monitoring, compilation, analysis and reporting of ambient air quality data; (D) procedures for pre-construction review of certain new sources; (E) intergovernmental cooperation; (F) assurances for funding and personnel, monitoring by sources, reports thereon and follow-up action by the state, public accessibility to data, and authority for emergency episodes; (G) periodic testing and inspection of motor vehicles, if necessary; and (H) revision of the plan upon the happening of certain conditions.

Nowhere in subparagraphs (A)-(H) is any mention made of the economic or technological feasibility of the plan, either expressly or implicitly. Section 110(a)(2) contains a rather long list of requirements which a state must meet before the Administrator's approval can be granted. It is illogical to assume that Congress would enact such

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[3] See *Train* v. *Natural Resources Defense Council, Inc.,* 421 U.S. 60, 95 S.Ct. ____, 43 L.Ed.2d 731 (1975). See, in particular, fn. 11. While the language in fn. 11 is dicta to that case, it is instructive that this Court reach the conclusion which we are now advocating.

a list of requirements, yet would intend that another factor, technological and economic feasibility, be an unspoken requirement for approval. Had Congress intended feasibility to be a prerequisite for approval, it would have said so in Section 110(a)(2). *Expressio unius est exclusio alterius.*

The lack of logic in assuming that Congress intended feasibility to be an unexpressed requirement of Section 110(a)(2) is shown by reference to other sections of the Act which do require that economics and technology be taken into account. Section 111 requires the promulgation by the Administrator of new source performance standards. Paragraph (a)(1) defines a standard of performance as:

> ". . . a standard for emissions of air pollutants which affect the degree of emission limitation achievable through the application of the best system of emission reduction which (*taking into account the cost* of achieving such reduction) the Administrator determines has been *adequately demonstrated.*"

Although not using the term "economic and technological feasibility", this paragraph quite clearly requires the Administrator to take these factors into account in setting standards of performance. *Portland Cement Ass'n.* v. *Ruckelshaus,* 486 F.2d 375 (D.C. Cir. 1973).

Section 202 requires the Administrator to establish emissions standards for motor vehicles. Paragraph 2, Section 202(a), provides:

> "Any regulation prescribed under this section (and any revision thereof) shall take effect after such period as the Administrator finds necessary to permit the development and application of the *requisite technology, giving appropriate consideration to the cost of compliance in such period.*"

Like Section 111 regarding new source performance stand-

ards, Section 202 requires that the Administrator take economic and technological factors into account in setting vehicle emission standards. *International Harvester Co.* v. *Ruckelshaus,* 478 F.2d 615 (D.C. Cir. 1973).

Similarly, Section 211(c)(2)(A), relating to control of fuels and fuel additives, provides that:

> "No fuel, class of fuel, or fuel additive may be controlled or prohibited by the Administrator pursuant to clause (A) of paragraph (1) except after consideration of all relevant medical and scientific evidence available to him, including consideration of other *technologically or economically feasible means* of achieving emissions standards under Section 202."

And Section 231(b), respecting the development of aircraft emission standards, provides:

> "Any regulation prescribed under this section (and any revision thereof) shall take effect after such period as the Administrator finds necessary (after consultation with the Secretary of Transportation) to permit the development and application of the *requisite technology, giving appropriate consideration to the cost of compliance* within such period."

Section 231(a)(1)(B) also requires the Administrator, in studying the emissions of air pollutants from aircraft, to determine "the technological feasibility of controlling such emissions."

The Administrator is required in four separate sections of the Act, in unmistakable terms, to take economic and technological feasibility into account in setting substantive standards. Yet Congress did not so provide in Section 110, the second setting forth criteria for the Administrator's approval of state implementation plans. This fact is even more significant when one considers that the

state-promulgated implementation plans are the primary source of air pollution abatement under the Act. *Train* v. *Natural Resources Defense Council, Inc., supra.*

Had Congress intended that the Administrator, in approving the primary tool in the regulatory scheme of the Act, take economic and technological feasibility into consideration, it surely would have made the requirement more clear. It specifically so provided in four other sections of the Act, each dealing with an instance where the Administrator was to take the initial action in promulgating substantive standards. The failure of Congress to so provide in Section 110, where the states were to promulgate the substantive standards, could not have been some error of omission.

2. The states may develop and submit implementation plans more stringent than required by Section 110(a)(2)(A).

The above interpretation of Section 110 of the Act, and of the Administrator's responsibilities under the Act, is further supported by this Court's decision in *Train* v. *Natural Resources Defense Council, Inc., supra.* In that case this Court had before it the question whether the Act allowed room for variances to be granted to individual sources, beyond the mandatory attainment date set by Section 110(a)(2)(A). In arriving at the conclusion that the Act did not bar state-granted variances which would not interfere with the attainment and maintenance of national ambient air quality standards, this Court noted:

> "The Agency is plainly charged by the Act with the responsibility for setting the national ambient air standards. Just as plainly, however, it is relegated by the Act to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the national standards it has set are to be met. Under §110(a)(2), the Agency is *required* to approve a state plan which provides for the timely attainment and subsequent maintenance of ambient air standards and which also satisfies that section's other general requirements. The Act gives the Agency no authority to question the wisdom of a State's choices of emission limitations if they are part of a plan which satisfies the standards of §110(a)(2), and the Agency may devise and promulgate a specific plan of its own only if a State fails to submit an implementation plan which satisfies those standards. §110(c). Thus, so long as the ultimate effect of a State's choice of emission limitation is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitation it deems best suited to its particular situation." 421 U.S. at 79 [Emphasis in original]

The above language is crucial to the resolution of the issues in the present case, for it sets forth Congress' delineation of responsibility between the states and the Administrator. EPA was to promulgate national ambient air quality standards for specific pollutants. Those standards were to be set at the levels of pollutants in the ambient air which the Administrator determined must be achieved to protect public health and welfare. Each state, however, was to determine how it wanted to achieve those standards, so long as national standards are attained within the periods specified by Section 110(a)(2)(A), and thereafter continue to be maintained.[4]

[4] In the process of determining that a mix of emission limitations which best suited its needs, each state would have the opportunity to consider the economic and technological feasibility of various alternatives. EPA encouraged, but did not require, the states to do so. 40 C.F.R. §51.2. As a practical matter, though, it would be necessary for a state to consider such factors, as well as others, in arriving at its desired mix of emission limitations and deadlines. The choice of who is to reduce emissions and by what amounts necessarily involves weighing of such factors.

Section 110 is a direction to the Administrator to approve a state plan if it provides, at the minimum, for attainment and maintenance of national ambient air quality standards, and it contains those specific means set out in subparagraphs (B)-(H) for enforcing the plan. But the states are not foreclosed by the promulgation of national ambient air quality standards from setting standards and limitations more stringent than required to meet the national standards. Section 116. Section 110 only establishes the minimum requirements that a state must meet to gain approval of its plan, and thereby qualify for a federal funding under Section 105.

Another indication of Congressional intent with regard to Section 110(a)(2), really an affirmation of that intent, is found in Section 110(a)(3)(B), the revision section. Subparagraph (B), added by the Energy Supply and Environmental Coordination Act of 1974, Public Law 93-319, reads:

"As soon as practicable, the Administrator shall . . . review each state's applicable implementation plans and report to the State on whether such plans can be revised in relation to fuel burning stationary sources . . . without interfering with the attainment and maintenance of any national ambient air quality standards within the period permitted in this section. If the Administrator determines that any such plan can be revised, he shall notify the state that a plan revision may be submitted by the state. Any plan revision which is submitted by the State shall, after public notice and opportunity for public hearing, be approved by the Administrator if . . . the plan as revised complies with paragraph (2) of this subsection. The Administrator shall approve or disapprove any revision no later than three months after its submission."

This provision clearly contemplates that state plans, as approved, may in fact be more stringent than required to attain and maintain national standards. The Administrator is directed to determine if any plans can be revised (made less stringent) without interfering with attainment and maintenance, and is directed to quickly approve any such revision submitted by a state. However, no revision can be approved if it will cause the plan to violate the requirements of Section 110(a)(2). Had Congress not intended that implementation plans could be more stringent than required by Section 110(a)(2)(A), the 1974 Amendment would have been totally unnecessary.

The argument by *amici*, Appalacian Power Company, *et al.*, that the Administrator cannot approve an implementation plan if it is more stringent than required by Section 110(a)(2)(A), is further refuted by the decision in *Sierra Club* v. *Ruckelshaus*, 344 F.Supp. 253, aff'd., sub. nom. *Fri* v. *Sierra Club*, 412 U.S. 541, 93 S.Ct. 2770, 37 L.Ed.2d 140 (1973). If the implementation plan cannot allow degradation of air quality to secondary standards, then plans for regions where the air is cleaner than secondary standards must, of necessity, be more stringent than required to maintain national standards. The Administrator, in those instances, would be required to disapprove the plan unless it was more strict than required to meet national standards. It follows that he may approve more stringent plans in all cases.

Section 110 and 116 are not, as *amici* Appalacian Power Co., *et al.*, would have it, a delineation of the bounds beyond which a state plan may not go if it is to gain approval. Instead, Section 110 sets forth the minimum scheme of air pollution abatement the states must undertake to gain federal approval, with Section 116 telling them that they may go further. Each state was to retain the "primary responsibility for assuring air quality" within its bound-

aries. Section 107(a); *Train* v. *Natural Resources Defense Council, Inc., supra.*

3. Congress intended that individual sources of pollutants would seek relief from the state, where compliance with an implementation plan was alleged to be infeasible.

Each state was free, under Section 110 and 116, to choose the mix of emission limitations which best suited its needs and societal goals, so long as such mix will attain and maintain national standards. Each state was also free to adopt air quality standards, emission limitations and control schemes more stringent than necessary to pass muster under Section 110. Section 116. However, such more stringent measures would not be subject to disapproval by the Administrator, even if they were more costly or more difficult to comply with. If, under the state plan compliance would be technologically impractical or economically unsound, as to a particular source of pollution, resort may be had to the state administrative agency for a variance. *Train* v. *Natural Resources Defense Council, Inc., supra.* Such relief would be allowed under the Clean Air Act, so long as it did not interfere with attainment and maintenance of some national standard. *Id.*

If, on the other hand, the national standards for a particular pollutant would not be attained, or maintenance was threatened, by noncompliance by a particular source, the variance procedure would be of no help to that source. Compliance must be achieved, even if difficult or impractical, for Congress had so ordered.[5] Section 110(a)(2)(A)

[5] We submit that only where national standards are being met and maintained can an individual source challenge an emission limitation on grounds that, as applied to it, the limitation is infeasible. *Natural Resources Defense Council, Inc.* v. *EPA*, 489 F.2d 390, 411-412, rev'd. on other grounds, sub. nom. *Train* v. *Natural Resources Defense Council, Inc., supra.*

Of course, if the state wished to shift the burden of compliance with national standards to other sources, so that the societal impact due to compliance by a particular source was minimized, then it could do so by revising its mix of emission limitations (e.g., imposing more stringent limitations on other sources) to ensure attainment and maintenance. Again, Congress left this essentially legislative determination to the state, and not to the Administrator.

requires attainment of primary standards not later than three years from the date of approval of the state plan.[6] In the case of primary standards, Congress has set the deadline; it "reflects a limit beyond which Congress has chosen to disregard arguments of 'impracticability'." *Indiana & Michigan Electric Co.* v. *EPA*, 509 F.2d 839, 844 (7th Cir. 1975).

In the situation at hand, Union Electric has obtained variances from Regulation X(B) pursuant to Missouri law.[7] Union Electric also has pending before the Missouri Air Conservation Commission applications for further vari-

[6] In the case of Missouri plan, May 31, 1975. 40 C.F.R. §52.1332. We submit that any question regarding Missouri's implementation plan to meet national primary standards is moot, as the deadline set by Congress has now passed.

[7] Section 203.110, Revised Statutes of Missouri, provides:

"1. The commission may grant individual variances beyond the limitations prescribed in this chapter whenever it is found, upon presentation of adequate proof, that compliance with any provision of this chapter or any rule or regulation, standard, requirement, or order of the commission, or executive secretary will result in an arbitrary and unreasonable taking of property or in the practical closing and elimination of any lawful business, occupation or activity, in either case without sufficient corresponding benefit or advantage to the people; except, that no variance shall be granted where the effect of the variance will permit the continuance of a health hazard; and except, also, that any variance so granted shall not be so construed as to relieve the person who receives the variance from any liability imposed by other law for the commission or maintenance of a nuisance.

2. In determining under what conditions and to what extent a variance may be granted, the commission shall exercise a wide discretion in weighing the equities involved and the advantages and disadvantages to the applicant and to those affected by air contaminants emitted by the applicant."

ances from Regulation X(B). We submit that questions of the economic and technological feasibility of compliance with state-promulgated emission limitations are, as asserted by the court below, matters best solved by the states.[8]

As pointed out above, the states are free, pursuant to Section 116, to adopt standards and limitations more stringent than those minimally required to attain and maintain national ambient air quality standards. The inclusion of such more restrictive standards and limitations in a state-submitted plan would not, however, indicate a need for the Administrator, or for the Courts of Appeals in Section 307(b) proceedings, to address the technological or economic feasibility of compliance with such plans.

The more stringent emission limitations[9] would presumably reflect a desire on the part of the people of the submitting state for cleaner air. In the case of limitations which were more restrictive or costly to achieve, they would also reflect a decision that particular sources should either comply, or curtail their operations. Such would be a choice which the state could make, in determining its own requirements for the protection of the public health and welfare.

If, as petitioner has alleged, compliance with such a limitation would cause great social or economic dislocation, then the affected source could seek a variance before the

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[8] Neither in its pleadings nor in its Brief has petitioner challenged the validity of Regulation X(B) as it applies to all sources in the St. Louis Air Quality Region. Petitioner only alleges that as to its plants, the emission limitation in such Regulation is economically and technologically infeasible. Whether petitioner ought be put to the trouble and expense of installing sulfur dioxide control equipment, with the resultant societal impact (of whatever magnitude), is a question which should be explored and answered by the State of Missouri, and not by EPA or the federal courts.

[9] More restrictive air quality standards would *per se* require more restrictive emission limitations.

state administrative body. Where the affected source's point was well taken, relief would presumably be granted. If not, the essentially legislative choice would have been made, the wisdom of which would not be subject to question by the Administrator, or the federal courts. *Train* v. *Natural Resources Defense Council, Inc., supra.*

In *Train* v. *Natural Resources Defense Council, Inc., supra,* this Court held that variances from an EPA approved implementation plan could be granted through a revision to such plan under Section 110(a)(3). That is, compliance with an emission limitation or deadline by an individual source may be deferred, so long as national standards are being attained and maintained. We submit that if the Administrator has no discretion to disapprove a waiver or delay of compliance by a particular source, where the requirements of Section 110(a)(2)(A) are being met, then he also has no discretion to disapprove a plan when submitted, so long as Section 110(a)(2)(A), and other requirements of Section 110(a)(2), are or will be met.

The act of approving a revision to a plan, and the act of approving the plan initially, are essentially the same task. In each case, the determination is mathematical, involving a calculation whether the absence of emission reduction by a source will cause a national standard to be violated. In either case, the Act gives the Administrator essentially no discretion to disapprove, if national standards are being met. Therefore, we submit that this Court's decision in *Train* v. *Natural Resources Defense Council, Inc., supra,* controls the issues in the case at bar.

It has been argued that in order for the Administrator to determine whether a state plan will assure attainment and maintenance of national standards, within the times specified in Section 110(a)(2)(A), he must necessarily engage in an assessment of the technological and economic

feasibility of the plan. This proposition is based on the assumption that an emission limitation which would in fact prove difficult or impractical for an individual source to achieve, other than by cessation of operations, would not be enforced, and would result in the non-attainment of national standards. Contrary to that assumption, this Court must presume that the law would be enforced.

As a matter of law, any state plan which contains standards and limitations at least as stringent as those minimally required under Section 110(a)(2)(A), would assure attainment and maintenance. Presuming the law to be enforced, attainment and maintenance would be achieved in one of three ways. First, the source may meet the emission limitation by that choice of abatement methods and procedures which best suits its own operations and needs. Second, if compliance by emission reduction techniques is technically impossible or economically infeasible, and a national standard is being violated, or maintenance threatened, that non-complying source must curtail operations, for Congress has said that the national standards must be met. In the alternative, the state might decide to revise its mix of emission limitations, so that the particular source would have a less stringent limitation applicable to it. The new mix, however, must still assure attainment and maintenance of national standards. Third, if no threat to national standards exists, the non-complying source could apply to the state administrative body for relief, with the right also to seek review in the state courts. Such relief, if granted, would not run afoul of Section 110. The refusal of relief, if lawfully done, would constitute a legislative (public policy) decision of the particular state.

Petitioner has suggested that there are stronger considerations for raising questions of technological and economic feasibility in Section 307(b) proceedings, where those questions arose after the administrator's approval of the

state plan. Under our view of the Clean Air Act, we see no such distinction. In either case, the determination of questions of impracticability or impossibility would be raised at the state level, in variance-type proceedings. At the federal level, such questions would be raised, as discussed in Point II, *infra*, in a conference with the Administrator and/or in enforcement proceedings. Under such circumstances, it makes no difference whether the factors causing the alleged infeasibility arose before or after the Administrator's approval of the plan.

In light of our argument above, one might ask the meaning of the language in Section 307(b)(1), providing for filing a petition for review more than thirty days after the Administrator's approval of a plan, if such petition is based on grounds arising after the thirtieth day. Under this provision, at least three types of grounds for review could arise, with regard to state implementation plans:

(1) It is alleged, on the basis of new ambient air quality data or the existence of new sources, that national standards will not be met within the time period specified in Section 110(a)(2)(A), or that maintenance of national standards is seriously threatened;

(2) The state is not enforcing the plan because it has lost legal authority or administrative capacity to meet the requirements of Section 110(a)(2)(C)-(H);

(3) New technology has been developed which will allow attainment of national standards more quickly than specified in the plan.

This interpretation of the last sentence of Section 307(b)(1) is supported by the clear purpose of the Act to cleanse the nation's air as soon as possible. Our interpretation of Sections 110 and 116 does not render Section 307(b) a nullity. It provides for review directly in the Courts of

Appeals when it is alleged that national standards are not being achieved or maintained, or will not be achieved as soon as Congress has directed.[10]

Finally, it is important to note that we are not talking about implementation plans merely to control emissions from three electric power plants belonging to petitioner. We are discussing the process by which a state develops and submits, and the Administrator approves, a plan to abate emissions from the thousands of sources of air pollution existing in each state. Many of those sources emit several of the pollutants for which national standards have been developed. It would be impossible for the state, or for the Administrator if he had been given the responsibility, to determine with exactitude, at the time plans are developed, the ability or desirability of each and every source to meet the emission limitations on time. Individual circumstances will, for the most part, have to be determined on a case-by-case basis, after the implementation plan is in effect. Were it otherwise, the goals of the Clean Air Act could not be achieved in the time frame set by Congress.

C. The decisions of the Courts of Appeals which support the petitioner's arguments were decided incorrectly.

We now turn to a discussion of the decisions which

[10] The last sentence of Section 307 (b) (1) would also require Court of Appeals review of new information regarding the hazardous nature of any pollutant for which national standards have been promulgated, as pointed out by the court below (A-23 and A-24, Pet. for Cert.). It would also require review of the Administrator's action in promulgating standards, limitations or prohibitions pursuant to Sections 111, 112, 202, 211 and 231. Such review would include review based on factors arising more than thirty days after the Administrator's action, which affect technological or economic feasibility, if the appropriate section makes the assessment of economic or technological feasibility a criterion for the Administrator's determinations. Of course, such review would be in the Court of Appeals for the District of Columbia.

bear on the issue at hand, with the purpose of showing why the cases cited by petitioner for support are incorrect. The premier case is *Getty Oil Co.* v. *Ruckelshaus*, 467 F.2d 349 (3d Cir. 1972). There a challenge to the Pennsylvania plan was brought in the district court. The Third Circuit held that the district court lacked jurisdiction to hear the challenge, as questions of technological and economical feasibility could be raised only in a Section 307(b)(1) proceeding.

The *Getty Oil* court reached its conclusion that questions of feasibility are reviewable under Section 307(b)(1) without indicating why the Act required such a holding. See 467 F.2d at 356. In fact, the conclusion reached runs counter to the reasoning followed in the rest of the opinion. The court recognized that the Act "says nothing about deferring compliance *merely* because such technology is not available." [Emphasis in original] 467 F.2d at 559. The court also recognized that it had no constitutional or statutory authority to substitute its judgment concerning a variance for that of the Pennsylvania administrative agency. 467 F.2d at 358. And the court found that the plaintiff had been afforded due process at the rule-making stage. 467 F.2d at 356.

Despite all of this, the *Getty Oil* court decided, without discussing its underlying rationale, that questions of feasibility should be raised in Section 307(b)(1) proceedings. We think that the court simply failed to undertake a careful analysis of the purpose of the Clean Air Act, particularly with regard to Sections 107, 110 and 116. Perhaps it was misled by the "exclusive forum" issue, 467 F.2d at 356, into believing that provision of a forum in which review might occur (Section 307(b)(1)) necessarily meant that review must occur there.

Whatever the reasoning behind the *Getty Oil* decision,

it provides the sole rationale for the holding of the Third Circuit in *Duquesne Light Co.* v. *EPA*, 481 F.2d 1 (3d Cir. 1973) (hereafter *Duquesne I*). In that case review of state plans was sought directly in the Court of Appeals pursuant to Section 307(b)(1). The court's holding was that the plaintiffs had not received an adequate hearing at the state level, prior to promulgation of the state plan. Therefore, EPA could not proceed to enforce the state plan until either (1) the state administrative and judicial remedies were concluded, or (2) EPA gave the plaintiffs a limited legislative hearing on their feasibility arguments. 481 F.2d 10.

It is obvious from the Third Circuit's discussion leading to the holding of *Duquesne I*, that its holding in *Getty Oil* controlled the decision. That is, claims of economic and technological infeasibility being reviewable in Section 307(b)(1) proceedings, such claims are barred by Section 307(b)(2) from being raised in federal enforcement proceedings. Therefore, according to the court, plaintiffs would be denied due process unless they had an opportunity to present their feasibility claims before sanctions were imposed in federal enforcement proceedings.

Duquesne I and *Getty Oil* both rest on a premise that Section 307(b)(2) prohibits raising economic and technological feasibility questions in federal enforcement proceedings; therefore such claims must be raisable in Section 307(b)(1) proceedings. Neither case inquired into why or what section of the Clean Air Act required the Administrator to assess such factors. Neither case inquired into the intent of Congress, and neither case is persuasive authority for the proposition for which it is cited.

The Third Circuit squarely addressed the issue of technological and economic feasibility in *St. Joe Minerals Corp.* v. *EPA*, 508 F.2d 743 (3d Cir. 1975). In holding that

the Administrator was required to assess feasibility when approving state plans, the court based its decision on the following factors:

(1) If Congress had intended that Section 110(a)(2) limit the Administrator's authority to review feasibility, it would have said so explicitly;

(2) Section 116 of the Act does not prevent the Administrator from adopting in an implementation plan a restriction which is less stringent than that which the state has adopted for state enforcement;

(3) The "as expeditiously as practicable" language of Section 110(a)(2)(A) shows that the Administrator should evaluate the workability of emission limitations submitted by a state;

(4) The Administrator submits each state plan to a committee, composed of members from other federal agencies, which necessarily looks at the feasibility questions. 508 F.2d at 748-749.

We have already addressed the first three basis for the court's holding in *St. Joe Minerals*. Therefore, we need not address them again, other than to reiterate that the Act on its face refutes the court's reasoning. The fourth basis for the court's holding has not been previously addressed.

We submit that the Administrator's practice of submitting state plans to other federal agencies for comment in no way bears on Congress' intent in providing, in Section 110, for approval of state implementation plans. In fact, the argument amounts to no more than bootstrapping. The rationale apparently is that the Administrator submits the state plans to agencies which could comment on various technological and economic impacts; therefore the Administrator is assessing technological and economic feasi-

bility; *ergo* the Act requires the Administrator to assess such factors. The logic of this proposition is clearly faulty.

The essential question is not what the Administrator does, but what is he required to do by Section 110? We have previously argued at length the duties of the Administrator under Section 110, and need not repeat the arguments here. Suffice it to say that we believe that Section 110 does not require the Administrator to address technological and economic feasibility, and any such assessment by other federal agencies is outside the scope of Section 110.

The fourth and most recent case decided by the Third Circuit is *Duquesne Light Company* v. *EPA*, 8 E.R.C. 1065 (3d Cir., Aug. 21, 1975) (hereafter *Duquesne II*). This case arose out of a new challenge to the Pennsylvania implementation plan, following the hearing held by EPA pursuant to *Duquesne I, supra*. The opinion in *Duquesne II* is an examination of the merits of the plaintiffs' feasibility arguments, and contains no useful discussion of the issues before this Court. In fact, the court merely refers to its previous cases in stating that economics and technology are matters which the Administrator must consider when passing on an implementation plan. 8 E.R.C. at 1066. *Duquesne Light II* provides no help to petitioner or this Court.

The four cases discussed above constitute the position of the Third Circuit on the issue before this Court. As pointed out, only *St. Joe Minerals Corp.* v. *EPA, supra,* adequately addresses the issue. We have shown by our argument that the conclusions reached in that case were an incorrect interpretation of the Clean Air Act.

Turning to the Fourth Circuit, we find *Appalacian Power Co.* v. *EPA*, 477 F.2d 495 (4th Cir. 1973). This challenge was filed directly in the Court of Appeals pursuant to Section 307(b)(1). The court, in determining that the

Administrator must consider economic and technological feasibility when approving state plans, found the following bases for its conclusion:

(1) Section 307(b)(2) means that an implementation plan is not subject to review, in any respect, in an enforcement proceeding. 477 F.2d at 499;

(2) Although the Administrator need not hold a hearing before approving a state plan, he must determine that the state adequately addressed economic and technological feasibility. This determination is subject to review in Section 307(b)(1) proceedings. 477 F.2d at 504;

(3) The Administrator conducts research and provides information to the states concerning technological and economic feasibility. Therefore, the Administrator necessarily considers such matters. 477 F.2d at 505-506;

(4) State plans are submitted to an inter-agency committee, and its is inconceivable that this committee, *ergo* the Administrator, does not consider economic and technological feasibility. 477 F.2d at 506;

(5) The Administrator must determine whether the state plan will achieve national standards within the time allowed by the Act. This necessarily involves assessment of feasibility. 477 F.2d at 506.

The last two bases for the Fourth Circuit decision have already been discussed and refuted in Part B, *supra,* and in the discussion regarding *St. Joe Minerals Corp.* v. *EPA, supra,* and need not be discussed further. The third basis, that the Administrator does conduct research and inquiry into technological and economic matters in order to aid the states in their task, provides no logical basis for concluding that Section 110(a)(2) requires the Administrator to assess such factors in approving state plans. As with the argument concerning the inter-agency com-

mittee, it is nothing more than bootstrapping. That is, the Administrator is aware of feasibility questions, and provides information to the state agencies on such matters; therefore, Congress must have intended that the Administrator consider feasibility in the context of Section 110(a)(2) approval. This rationale simply overlooks the clear language of Section 110 itself.

The second rationale for the *Appalacian Power* decision, that the Administrator must determine whether the state agency adequately considered economic and technological questions, ignores the state/federal dichotomy imbedded in the Act. See *Train* v. *Natural Resources Defense Council, Inc., supra.* It is the state which must consider questions of the societal impact of a particular scheme of air pollution abatement (mix of emission limitations). As argued before, if the state chooses to set its emission limitations in such a manner that a particular source might have to curtail operations to meet the limitations, that is a legislative choice left to the state by the Act.

The first ground relied on by the Fourth Circuit for its holding is really the key to its decision. The court concluded that Section 307(b)(2) precluded the raising of *any* arguments regarding the application of a state plan, as to an individual source, in federal enforcement proceedings. However, Section 307(b)(2) precludes petitioner from raising in enforcement proceedings only those arguments which were relevant in Section 307(b)(1) review proceedings, not every argument a source might have against the application of an emission limitation to it.

We will further discuss this aspect of this *Appalacian Power* case in Point II, *infra.* Suffice it to say that we believe that the whole rationale of the Fourth Circuit's decision was based on the incorrect premise that Section 307(b)(2) precluded raising feasibility challenges in federal

enforcement proceedings; *ergo* such challenges must be raised pursuant to Section 307(b)(1). This constituted putting the cart before the horse, and necessarily controlled the outcome of the case. The Fourth Circuit simply failed to properly analyze what factors were relevant to the Administrator's inquiry under Section 110(a)(2), and therefore relevant in Section 307(b)(1) proceedings.

The last case cited by petitioner as supporting its position is *Buckeye Power, Inc.* v. *EPA,* 481 F.2d 162 (6th Cir. 1973).[11] That court, in a Section 307(b) proceeding, concluded:

(1) The Administrative Procedure Act requires the Administrator to hold a limited, legislative-type hearing before approving state implementation plans;[12]

(2) The Act shows that the Administrator need not fully consider the impossibility claims of the plaintiffs, because of time constraints placed on the Administrator by the Act; therefore, such claims can be raised in enforcement proceedings. 481 F.2d at 165.

Rather than supporting petitioner's argument, this case cuts against it. The court concluded that feasibility

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[11] *Amici,* Appalacian Power Co., *et al.,* cite two additional cases, *South Terminal Corp.* v. *EPA,* 504 F.2d 646 (1st Cir. 1974) and *District of Columbia* v. *Train,* 521 F.2d 971 (D.C. Cir. 1975), to support petitioner's proposition. Those cases are inapposite, as they deal with EPA promulgation of transportation control plans. In each case the essential question was the necessity for the particular requirement. 504 F.2d at 671-676; 521 F.2d at 997. The Administrator is clearly not authorized to establish control schemes (these were not emission limitations) more restrictive than required to attain and maintain national standards. In addition, where EPA, rather than the state, is developing an implementation plan, it would consider feasibility, as the states do in developing their implementation plans.

[12] This issue, although raised by *amici* Appalacian Power Co., *et al.,* was not raised by petitioner in its pleadings (Appendix, pp. 2-9), or in the Petition for Certiorari. Therefore, this issue is not now before this Court.

was relevant under the Act, but did not specify at what stage of the process it was relevant. 481 F.2d at 168-169. The court did conclude, however, that because of the four-month time limitation on the Administrator's approval of state plans, he could not fully consider feasibility claims at that stage. Therefore, the court holds, such claims can be fully raised as a defense in enforcement proceedings. 481 F.2d at 173.

While not advocating that this Court adopt the approach taken by the Sixth Circuit,[13] we do think that *Buckeye Power* raises a compelling argument for the interpretation of the Act we advance. Surely Congress could not have intended that the Administrator meet the deadlines contained in Sections 109 and 110(a)(1), so that a system of air pollution abatement to protect the public health and welfare could be quickly implemented, and also intend that he fully consider the myriad economic and technological claims of the numerous stationary sources. The two functions are simply incompatible, and Congress cannot be presumed to have intended such an absurd result. For the Administrator to meet the statutory deadlines, and for the abatement program to get under way quickly, it is logical to assume that Congress intended that claims of individual infeasibility be considered by the state administrative agencies, and at the enforcement stage in the federal courts.

We find further support for our argument in *Indiana & Michigan Electric Co.* v. *EPA*, 509 F.2d 839 (7th Cir. 1975). In that case two power companies challenged the state plan on grounds of economic and technological feasibility. In holding that such questions need not be considered by the Administrator in approving state plans under Section 110, the court adopted the same rationale as we have

[13] The *Buckeye Power* case is a perfect example of the confusion which can result from undue reliance on contradictory legislative history.

advanced in this Brief. Rather than engage in another discussion of these points, we merely cite the Court to the Seventh Circuit opinion. We would point out that the Seventh Circuit did not find it necessary to resort to the legislative history of the Clean Air Act to determine the intent of Congress with regard to Section 110. It found the Congressional intent on the face of the Act, as we believe this court should. We submit that *Indiana & Michigan Electric Co.* v. *EPA, supra,* is the better reasoned approach to interpretation of Section 110.

Such an approach better serves the state/federal relationship embodied in the Act, yet takes nothing from petitioner's rights. It also is in agreement with the result reached by the court below. We urge this Court to adopt the approach of the Seventh Circuit, and the result of the Eighth Circuit, and hold that in approving state implementation plans under Section 110, the Administrator need not consider matters of economic and technological feasibility.

II. Petitioner will not be denied due process of law if it cannot raise issues of technological and economic feasibility in Section 307(b) proceedings, as it has available to it other remedies and other forums for review.

It is undeniable that the Due Process Clause requires that petitioner receive, at some point, a full and fair hearing on any relevant feasibility arguments.[14] *Boddie* v. *Connecticut*, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971). However, there is nothing within the parameters of the Due Process Clause which would dictate that a Section 307(b) proceeding is the only means by which petitioner can receive due process. Section 307(b) review is a

[14] We will assume for purposes of this argument that economics and technology are relevant to the enforcement of implementation plans. However, the Court need not decide this question in the case at bar.

special proceeding created by Congress to review the Administrator's actions under various sections of the Clean Air Act. Congress apparently felt that a quick review process was desirable, as it chose to bypass the district courts. Congress also put a thirty day limitation on the filing of petitions for review under Section 307(b), again in an effort, apparently, to ensure quick review.

However, there is nothing in Section 307(b) which would in the least way indicate that Congress intended that such proceedings would be the exclusive method of raising all possible issues associated with the promulgation of implementation plans. We have no quarrel with the petitioner's assertion that Congress could, if it wanted, provide for the determination of economic and technological feasibility questions, in the first instance, in the Courts of Appeals. However, the provision for such review does not necessarily follow from the power to do so.

As discussed previously, it is clear that Congress intended, in regard to state implementation plans, that only those factors which the Administrator considered pursuant to Section 110(a)(2) would be reviewed in Section 307(b) proceedings. We have also argued that economic and technological feasibility are not among the factors to be considered by the Administrator pursuant to Section 110. If such propositions are correct, then petitioner can receive his day in court during any enforcement proceeding taken pursuant to Section 113.

A. Section 307(b) does not preclude review of questions of economic and technological feasibility at the enforcement stage.

Petitioner points to Section 307(b)(2) as evidence that feasibility questions must be necessity be raised in Section 307(b) review proceedings. Section 307(b)(2) states:

> "Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement."

However, petitioner's argument[15] disappears if this Court holds that feasibility questions are not reviewable in Section 307(b) proceedings. For if these matters cannot be raised pursuant to Section 307(b)(1), then Section 307(b)(2) would not prevent their being raised in enforcement proceedings. See *Indiana & Michigan Electric Co.*, 509 F.2d 839 (7th Cir. 1975); *Reichhold Chemicals* v. *EPA*, 8 E.R.C. 1207 (7th Cir. 1975). Petitioner concedes that it would be afforded due process if given the opportunity to raise its easibility arguments in an enforcement proceeding (Pet. Brief, p. 31).

B. Petitioner can also apply for relief, and obtain a full and fair hearing, in state administrative and judicial tribunals, as well as presenting its feasibility arguments in a Section 113 conference with the Administrator.

We submit that petitioner will have two other opportunities to present its feasibility arguments, and thus receive due process. The first opportunity, coming before federal enforcement proceedings, is in a conference with the Administrator pursuant to Section 113(a)(4). That paragraph states:

> "An order issued under this subsection . . . shall not take effect until the person to whom it is issued has had an opportunity to confer with the Administrator concerning the alleged violation. . . . Any order issued under this subsection shall state with reasonable spe-

[15] Similar positions have been taken by the Third and Fourth Circuits. *Getty Oil Co.* v. *Ruckelshaus*, 467 F.2d 349 (3d. Cir. 1972); *Appalacian Power Co.* v. *EPA*, 477 F.2d 495 (4th Cir. 1973).

cificity the nature of the violation, specify a time for compliance which the Administrator determines is reasonable, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements. . . ."

It should be noted that the Administrator may proceed with a civil action without the issuance of a compliance order. However, if such order is issued before a civil suit is commenced, petitioner will have an opportunity to present its feasibility arguments to the Administrator. Such is clearly implied by the requirement that the order take into account "any good faith efforts to comply." *Indiana & Michigan Electric Co.* v. *EPA, supra,* at 846.

The second, and more significant, opportunity for presentation of feasibility claims is in the state administrative and judicial tribunals. *Indiana & Michigan Electric Co.* v. *EPA, supra.* As noted before, petitioner may apply to the Missouri Air Conservation Commission for a variance from Regulation X(B), and has done so in the past. The Commission has wide lattitude in considering matters of social impact. Section 203.110, RSMo.

Whether a particular source must comply with a state regulation (plan), or may receive a variance therefrom because the societal impact of compliance is too great, is essentially a legislative choice. Congress has answered the question where national standards are being violated. Section 110(a)(2)(A). Congress has left such determinations to the state, and not to EPA, where national standards are being maintained. Section 110(a)(3); Section 116; *Train* v. *Natural Resources Defense Council, Inc.,* 421 U.S. 60, 95 S.Ct. ____, 43 L.Ed.2d 731 (1975). By presenting its feasibility arguments to the state administrative agency, a particular source receives its required hearing on such issues. The right to an administrative hearing implies the

right to review in the state courts. In this way, the source is assured of receiving its full and fair hearing, as required by the Due Process Clause.

Petitioner did not raise in its pleadings any question of denial of due process for failure of the Administrator to hold a hearing before approving the Missouri plan. Nor is this question contained within the question for which certiorari was granted. Therefore, such question, although argued in the Brief of *amici* Appalacian Power Co., *et al.,* is not before the Court. We will not brief this point. However, it is well settled that even if a hearing is required before administrative action is taken,[16] the opportunity for judicial review before sanctions are applied satisfies any due process requirements. *Nickey* v. *Mississippi,* 292 U.S. 393, 54 S.Ct. 743, 78 L.Ed. 1323 (1934); *Rowan* v. *United States Post Office Dept.,* 397 U.S. 728, 90 S.Ct. 1484, 25 L.Ed.2d 736 (1970); *Indiana & Michigan Electric Co.* v. *EPA, supra.*

Mention has been made by several of the Courts of Appeals of the so-called Getty Oil dilemma. In *Getty Oil* v. *Ruckelshaus,* 467 F.2d 349 (3d Cir. 1972), the court concluded that questions of feasibility could be raised in Section 307(b)(1) proceedings, but not in enforcement proceedings. The plaintiff in that case had not filed a Section 307(b)(1) petition within the thirty day limit, but instead had filed a petition for declaratory judgment in the district court. The Administrator contended that Getty Oil could obtain relief via the state agency. The court noted, however, that Getty could still face federal prosecution before the state proceedings were concluded and a revised implementation plan was approved. Therefore, the state proceedings were of no help to Getty.[17]

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[16] We are not conceding that due process required such a hearing. Again, the question was not raised by petitioner.

[17] This apparent dilemma may be the reason the court in

The Getty Oil dilemma vanishes, however, where the court holds that feasibility claims can be presented in federal enforcement proceedings. See *Indiana & Michigan Electric Co.* v. *EPA, supra.* If petitioner can raise infeasibility as a defense in a federal enforcement proceeding (should prosecution occur before the Missouri variance proceedings are completed), then it will have received due process. *Id.; Rowan* v. *United States Post Office Dept., supra; Nickey* v. *Mississippi, supra.* In the situation where national standards are being attained or maintained, it would be logical for the Administrator to abstain from enforcement until state proceedings are concluded. However, the Getty Oil dilemma exists only where it was held that feasibility arguments could not be raised in enforcement proceedings.

III. A holding that petitioner cannot obtain review of questions of economic and technological feasibility in Section 307(b) proceedings will best serve the state/federal relationship embodied in the Clean Air Act, and will avoid the procedural and practical difficulties of injecting technical factual issues into the appellate level in the first instance.

In *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60, 95 S.Ct. ____, 43 L.Ed.2d 731 (1975), this Court recognized that under the Clean Air Act the states have the primary role in determining how national ambient air quality standards will be met. The state/federal relationship was obviously a major concern for Congress when writing the Act, for the Act draws an important distinction between the role of the Administrator and the roles of the various states in abating air pollution. We submit that only by holding that questions of economic and technological

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Duquesne Light Co. v. *EPA*, 481 F.2d 1 (3d Cir. 1973), granted the alternative remedies of abstention from federal prosecution until the state proceedings were concluded, or a limited hearing before the Administrator.

feasibility are not a part of the Administrator's inquiry under Section 110(a)(2), and thus not reviewable in Section 307(b) proceedings, will that distinction be adequately preserved.

If this Court holds as we request, questions of feasibility will continue to be decided at the level most sensitive to societal impacts, and most interested in adjusting the competing demands of various segments of society. In that way, all of society is benefited to the maximum extent possible. If, on the other hand, this Court holds that questions of feasibility are relevant to the Administrator's inquiry under Section 110(a)(2), we believe that the decisions, often legislative in character, affecting the delicate balance between clean air and the local economy, will as a practical matter be made by EPA and the federal judiciary.

Despite the ability of the Administrator to make, and the federal courts to review, policy decisions concerning air pollution abatement as it affects local interests, such decision-making should not be removed from the states unless Congress clearly intended such a result. We submit that such an intent on the part of Congress is not clearly expressed in the Act. Therefore, we encourage the Court to take that approach to the interpretation of Section 110(a)(2) which best preserves the states' role in air pollution abatement.

Moreover, the initial review of questions of economic and technological feasibility in the Courts of Appeals presents procedural and practical difficulties not found when such questions are raised, in the first instance, before the state administrative agencies and federal trial courts. The latter tribunals are better equipped for dealing with difficult factual, highly technical problems. While there is some doubt whether the Courts of Appeals can appoint masters to aid them, there is authority for the proposition

that such power in inherent. See *Union Electric* v. *EPA*, *supra*, A-7 of Pet. for Cert. Certainly, however, such procedure is not the normal course of action. Apparently, the court below felt that such a procedure was not a desirable way of handling the factual issues presented by petitioner.

The Eighth Circuit is not the only court to express dissatisfaction with initial review of such matters at the appellate level. In a concurring opinion in *Texas* v. *EPA*, 499 F.2d 289, 321 (5th Cir. 1974), Judge Clark points out the problems of Section 307(b) review. He concludes by saying:

> "The subject matter of this action involves the health and welfare of millions of citizens, the continued business vitality of tens of thousands of firms and compliance expenditures costing billions of dollars.
>
> "These extensive rights deserve a more orderly process of judicial reflection." *Id.*, at 322.

See also, *South Terminal Corp.* v. *EPA*, 504 F.2d 646, 665 (1st Cir. 1974).

The practical effect of allowing feasibility questions to be raised in Section 307(b) proceedings is well illustrated by the situation which now exists in the Third Circuit. Because of the holding in *Getty Oil* v. *Ruckelshaus*, 467 F.2d 349 (3d Cir. 1972), the deadlines for attainment of emission limitations for sulfur dioxide in Pennsylvania, as to some sources, have been delayed until 1977, and could be delayed even longer. See *Duquesne Light Co.* v. *EPA*, 8 E.R.C. 1065 (3d Cir. Aug. 21, 1975). Such delay can obviously affect attainment of national standards. This is clearly contrary to the intent of Congress, expressed in Sections 109 and 110, to require attainment of national primary standards by mid-1975. Had the feasibility claims of those sources been presented to the state agency instead, such delay would not have occurred.

While the practical and procedural problems mentioned above do not by themselves mandate a holding that feasibility questions are not reviewable in Section 307(b) proceedings, an interpretation of the Act which avoids those problems certainly would be reasonable. In addition, an interpretation of the Act which best preserves the state/federal dichotomy embodied in the Act is warranted. Therefore, we urge the Court to take that view of the Act which best serves these interests.

CONCLUSION

We urge the Court to adopt the approach taken by the Seventh Circuit, and uphold the decision of the court below, by interpreting Section 110(a)(2) of the Clean Air Act to exclude questions of economic and technological feasibility from the inquiry of the Administrator in approving state implementation plans. We further urge the Court to adopt that interpretation of the Clean Air Act which best preserves the states' primary role in the scheme of air pollution abatement. Therefore, we urge that the decision of the court below, dismissing the petition of Union Electric Co. for lack of jurisdiction, be affirmed.

Respectfully submitted,

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